U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 19 January 2006

Case No. 2004-BLA-06553

In the Matter of:

ALLEN A. ROTHERMEL,
Claimant,

v.

SCHUYLKILL COAL PROCESSING, INC.
Employer,

and

ROCKWOOD CASUALTY INSURANCE CO.,
Carrier,

And

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Ms. Helen M. Koschoff, Esq.
Wilburton, Pennsylvania
For the Claimant

Mr. Sean Epstein, Esq.
Pittsburgh, Pennsylvania
For the Employer

BEFORE: PAUL H. TEITLER
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1977, 30 U.S.C.

§§ 901-962, ("the Act"). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a)(2001).

On July 14, 2004, this case was referred to the Office of Administrative Law Judges for a formal hearing. (DX 83). Following proper notice to all parties, a formal hearing was held on June 28, 2005, in Reading, Pennsylvania. The Director's exhibits were previously admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence and to present closing arguments or post-hearing briefs.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations. I incorporate the September 5, 2002, Decision and Order Denying Benefits by Judge Kaplan as if fully rewritten herein.

The Act's implementing regulations are located at Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title.[1] References to ALJX, DX, CX, and EX refer to the exhibits of the Administrative Law Judge, Director, Claimant, and Employer, respectively. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues remain for resolution:

1. Whether the claim was timely filed;

2. Whether the person whose disability the claim is based is a miner;

3. Whether the miner worked as a miner after December 31, 1969;

4. Whether the miner worked at least twenty-six years in or around one or more coal mines;

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[1] The Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). On August 9, 2001, the United States District Court for the District of Columbia issued a Memorandum and Order upholding the validity of the new regulations. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

5. Whether the miner has pneumoconiosis as defined by the Act;

6. Whether the miner's pneumoconiosis arose out of coal mine employment;

7. Whether the miner is totally disabled;

8. Whether the miner's disability is due to pneumoconiosis;

9. Whether Claimant has dependants for purposes of augmentation;

10. Whether the named employer is the Responsible Operator;

11. Whether the named employer has secured the payment of benefits;

12. Whether the evidence establishes a material change in conditions per 20 C.F.R. §725.309(c), (d);

13. Whether the evidence establishes a change in condition and/or that a mistake was made in the determination of any fact in the prior denial per 20 C.F.R. 725.310; and

14. Whether the miner's most recent period of cumulative employment of not less than one year was with the named Responsible Operator.

(DX 83).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background

Allen A. Rothermel (Claimant) was born July 11, 1938. (DX 1, 53). He completed the tenth grade. (DX 1, 53). He married Beverly Sherman on July 11, 1959. (DX 1). The couple divorced on February 11, 1993. (DX 8). Claimant did not list any children on his application. (DX 1). Therefore, I find that Claimant does not have any dependents for purposes of benefits augmentation.

Claimant testified at the first formal hearing on March 12, 2002. (DX 53). Claimant worked for a short length of time in underground coal mining. (DX 53, p. 28). The remainder of his coal mine employment was above ground in either stripping or breakers. (DX 53, p. 28). He operated heavy equipment. (DX 53, p. 29). His last coal mine employment was with Schuylkill Coal Processing, Inc., where he operated a rock shaker. (DX 53, p. 29). He was required to pull the big rocks from the coal before the coal went into the crusher. (DX 53, 29). Some of the rocks weighed 75 pounds, and Claimant would slide those down a chute. (DX 53, p. 30). Claimant also helped repair equipment such as the hoppers. (DX 53, p. 30). His job required him to crawl, climb, lift and carry heavy objects sometimes up to 100 pounds. (DX 53, p. 30). He was continually exposed to coal and rock dust. (DX 53, p. 31). Claimant stated that he worked approximately 25.75 years in the coal industry. (DX 53, p. 30-31).

Claimant testified that he first started having breathing problems around 1999. (DX 53, p. 31). His breathing problems have been getting worse. (DX 53, p. 31). He can only walk about one block on level ground before becoming short of breath and stopping. (DX 53, p. 31). He can only take about 10 or 20 steps before stopping and trying to regain his breath. (DX 53, p. 32). Claimant could not return to his work in the coal industry because of his breathing problems. (DX 53, p. 32). Claimant's treating physician is Dr. Matthew Kraynak, whom he visits once a month. (DX 53, p. 32, 36). Claimant uses Combivent, an inhaler, for his breathing problems. (DX 53, p. 32). He also takes blood pressure pills and water pills. (DX 53, p. 33). Claimant testified that he never had problems with his heart, chest pains, or chest tightness. (DX 53, p. 33). Weather does not seem to affect his breathing. (DX 53, p. 33). Claimant has a productive cough. (DX 53, p. 33). No doctor ever suggested that Claimant lose weight to improve his breathing. (DX 53, p. 33).

On cross-examination, Claimant stated that he quit working because of his breathing. (DX 53, p. 34). He receives Social Security disability benefits for arthritis. (DX 53, p. 34). Claimant admitted that he smokes about three-quarters to 1 pack of cigarettes per day. (DX 53, p. 35). He started smoking at age 25 but quit at age 55 for 6 years. (DX 53, p. 34). Claimant did not see any other doctors nor been hospitalized for his breathing problems. (DX 53, p. 37).

Claimant did not offer additional testimony at the subsequent hearings. (ALJX 5; Tr. 3).

Procedural History

Claimant filed this claim for benefits on November 14, 2000. (DX 1). On April 26, 2001, the District Director issued an Order to Show Cause as to why the claim should not be denied by reason of abandonment. (DX 23). The Order to Show Cause of Abandonment became final on June 12, 2001, because Claimant refused additional medical testing. (DX 28, 27). On May 8, 2001 and again on June 21, 2001, Claimant requested a formal hearing before an Administrative Law Judge. (DX 25, 29). The claim was referred to the Office of Administrative Law Judges on September 11, 2001. (DX 31). Administrative Law Judge Ainsworth H. Brown conducted a formal hearing on March 12, 2002, in Reading, Pennsylvania. (DX 48, 50, 51, 53).

In an Order dated May 1, 2002, the case was reassigned to Administrative Law Judge Robert D. Kaplan because Judge Brown passed away on April 18, 2002. (DX 48). Claimant's motion for leave to file rebuttal evidence was granted, in part, and denied, in part, on May 16, 2002. (DX 50).

On September 5, 2002, Judge Kaplan issued a Decision and Order Denying Benefits. (DX 55). Although Claimant proved that he was totally disabled, he failed to establish the existence of pneumoconiosis by a preponderance of the evidence. (DX 55). Judge Kaplan did not address whether pneumoconiosis arose out of his coal mine employment because Claimant failed to show that he suffered from pneumoconiosis. (DX 55). Claimant did not establish the presence of pneumoconiosis, and, therefore, could not prove that his total disability was caused by pneumoconiosis. (DX 55).

Claimant filed a notice of appeal on September 11, 2002. (DX 56). On February 20, 2003, Claimant requested that the Benefits Review Board ("Board") remand his claim to the District Director in order to pursue modification proceedings. (DX 58). The Board issued an Order on March 5, 2003, remanding this action to the District Director for modification proceedings. (DX 59). In a letter dated May 21, 2003, the District Director allowed Claimant 30 days to submit additional evidence in support of his claim. (DX 62). Claimant filed one additional pulmonary function test dated May 21, 2003, and a medical report from Dr. Kraynak. (DX 63, 64). The District Director issued a Proposed Decision and Order Denying Request for Modification on July 1, 2003, because there did not appear to be a material change in condition or a mistake in fact since the prior denial. (DX 65). On July 10, 2003, Claimant requested a formal hearing before an Administrative Law Judge. (DX 67). On October 21, 2003, the claim was referred to the Office of Administrative Law Judges for a formal hearing. (DX 77).

Employer filed a Motion to Dismiss on November 18, 2003, on the basis that Claimant abandoned the claim by failing to comply with Employer's discovery requests. (DX 79). In the alternative, Employer requested an order compelling Claimant to attend the independent medical evaluation by Dr. Galgon. On January 9, 2004, the undersigned canceled the scheduled formal hearing and issued an Order remanding the claim to the District Director for Claimant to undergo a full medical examination by Dr. Galgon, excluding chest x-rays. (DX 80).

On July 13, 2004, this claim was again referred to the Office of Administrative Law Judges for a formal hearing. (DX 83). A formal hearing was held on June 28, 2005, in Reading, Pennsylvania before the undersigned Administrative Law Judge.

MEDICAL EVIDENCE

X-Ray Reports[2]

Exhibit	Date of X-ray	Date of Reading	Physician/Qualifications	Interpretation
DX 82, EX 1[3]	03/10/04	03/10/04	Galgon[4]	Negative, Category 0/0
EX 4	12/12/03	02/12/04	Duncan, BCR,[5] B-reader[6]	Negative, Category 0/0

[2] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. § 718.102(a,b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

[3] Director's Exhibit 82 and Employer's Exhibit 1 are the same document.

[4] Dr. Galgon listed on his Curriculum Vitae that he was re-certified as a NIOSH B-reader in 1991. (DX 82). However, the NIOSH B-reader List states that Dr. John Paul Galgon from Allentown, Pennsylvania, is a certified A-reader from January 2004 to the present. Note: If an ALJ utilizes information outside the official record, then the parties must be given notice and opportunity to be heard. *Maddaleni v. Pittsburgh & Midway Coal Mining Co.*, 14 B.L.R. 1-135 (1990).

[5] A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[6] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health

EX 3	03/10/04	07/08/04	Duncan, BCR, B-reader	Negative, Category 0/0
CX 14	03/10/04	09/15/04	Miller, BCR, B-reader	1/0
CX 13	03/10/04	09/13/04	Ahmed, BCR, B-reader	1/0
CX 3	12/12/03	12/19/03	Ahmed, BCR, B-reader	1/0
CX 7	12/12/03	12/22/03	Miller, BCR, B-reader	1/0
CX 5	12/12/03	12/23/03	Capiello, BCR, B-reader	1/0
CX 22	03/10/24	09/20/04	Capiello, BCR, B-reader	1/0
EX 5	03/10/04	04/14/05	Fino,[7]	Negative

Pulmonary Function Studies[8]

Exhibit/ Date	**Co-op./ Undst./ Tracings**	**Age/ Height**	**FEV_1**	**FVC**	**MVV**	**FEV_1/ FVC**	**Qualifying Results**
DX 82, EX 1 03/10/04	Yes/ /[9] No[10]	65/ 72.0"	2.37 2.39*	3.31 3.39*	[11]	72% 70%*	No.[12]
CX 15 05/21/03	Good/ Good/ Yes	64/ 71"	2.64	2.86	51.93	92.30%	No.[13]
CX 29 05/26/05	Good/ Good/ Yes	66/ 71"	1.75 1.74*	2.73 2.57*	47.59 52.55*	64.10% 67.70%*	Yes.[14]

*Results obtained after bronchodilator

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and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979).

[7] Dr. Fino's Curriculum Vitae states that his B-reader certification expired on January 31, 2005. However, the NIOSH B-reader list shows that he is currently certified as a B-reader.

[8] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. § 718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Board has held that a ventilatory study which is accompanied by only two tracings is in "substantial compliance" with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp*., 12 B.L.R. 1-27 (1988). The values from the FEV_1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

[9] Dr. Galgon did not note Claimant's understanding of the test. (DX 82). He noted that Claimant was "pleasant and cooperative." (DX 82). However, Dr. Galgon stated in his deposition that Claimant's effort was "adequate." (EX 2, p. 15).

[10] The record does not contain three tracings as required by § 718.103(b). There is one tracing is of Flow (l/s) with a pre-bronchodilator and a post-bronchodilator line. (DX 82). The other tracing is of Volume (l) with a pre-bronchodilator and a post-bronchodilator line. (DX 82).

[11] Not recorded. (DX 82, EX 2)

[12] Drs. Galgon, Venditto, and Simelaro invalidated this study. (EX 2, CX 11, CX 9).

[13] Study validated by Drs. Prince, Simelaro, Venditto, and Kraynak. (CX 16, 18, 19, 30). Dr. Fino invalidated this study. (EX 5).

[14] Study invalidated by Dr. Fino. (EX 6).

Arterial Blood Gas Studies[15]

Exhibit	Date	pCO_2	pO_2	Qualifying
DX 82, EX 1	03/10/04	37	68	No.
DX 82, EX 1	03/10/04	38	69	No.
DX 82, EX 1	03/10/04	40*	81*	No.
DX 82, EX 1	03/10/04	40*	83*	No.

*Results obtained with exercise

Narrative Medical Evidence

Dr. John P. Galgon (DX 82, EX 1)

Dr. Galgon, who is Board-certified in internal medicine and pulmonary disease, evaluated Claimant on March 10, 2004. He reviewed Claimant's social history, family history, occupational history, medical history, and smoking history. Dr. Galgon performed a chest x-ray, pulmonary function test, arterial blood gas study, and electrocardiogram.

Dr. Galgon reported that Claimant was a coal miner for 26 years with 2 to 3 years in underground coal mining. Claimant stated that his last job in the coal mines involved light to moderate labor operating heavy equipment. His job was extremely dusty. Claimant reported that he started smoking at 30 years of age at the rate of 1 pack per day. Dr. Galgon summarized the Claimant smoked cigarettes for 25 years, averaging 1 pack per day, and that Claimant currently smokes ½ pack per day. Claimant's medical history included high blood pressure, diabetes, bursitis, emphysema, heartburn, kidney stones, arthritis, chronic back pain, dizziness on standing, and loud snoring with unrefreshed sleep.

On reviewing Claimant's symptoms, Dr. Galgon noted that Claimant's shortness of breath has been worsening over the last 10 years. Although Claimant is comfortable at rest, he has to stop when walking ¼ of a block on level ground and after walking up 1 flight of stairs. Claimant's daily cough has progressively worsened over the last 5 years and produces about 3 tablespoons of yellow sputum per day. Claimant further complained of wheezing when walking and some sudden episodes of wheezing at rest that require the use of an inhaler.

On physical examination, Dr. Galgon noted that Claimant had good breath sounds without rales or wheezes. The chest x-ray was negative for pneumoconiosis, Category 0/0. The pulmonary function test showed no evidence of large airways obstruction but was suggestive of a small airways obstruction as is typically seen in patients who smoke cigarettes. The arterial blood gas study was abnormal. The electrocardiogram had a normal sinus rhythm but suggested an old myocardial infarction.

[15] Blood gas studies are preformed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. § 718.105(a).

Dr. Galgon determined that Claimant does not have coal workers' pneumoconiosis. He based this opinion on the examination showing good breath sounds without rales or wheezes and the results of the chest x-ray. Although Claimant's pulmonary function test was abnormal, Dr. Galgon noted that the mild airways obstruction was entirely consistent with Claimant's past and continuing use of tobacco. Dr. Galgon stated, "It would be highly unusual for this obstruction to be secondary to pneumoconiosis, since obstruction due to pneumoconiosis typically occurs at high grades of pneumoconiosis, such as category 3." Dr. Galgon found that the vital capacity on the pulmonary function test was slightly reduced but attributed this to Claimant's elevated diaphragm and not pneumoconiosis. Dr. Galgon ruled out pneumoconiosis based on the abnormal results of the arterial blood gas study for two reasons. First, Claimant was obese and the reduced pO_2 value was expected. Second, Dr. Galgon would have expected a prompt drop in pO_2 values of at least 10mm if Claimant had any kind of significant interstitial lung disease, including coal workers' pneumoconiosis. In his final conclusion, Dr. Galgon stated that Claimant "does not have pneumoconiosis, and has neither impairment nor disability due to pneumoconiosis."

Deposition of Dr. John P. Galgon, (EX 2)

Employer took the deposition of Dr. Galgon on October 14, 2004. Dr. Galgon testified that he has been licensed to practice medicine in the Commonwealth of Pennsylvania for more than 35 years. (EX 2, p. 7). He further testified that he is an "A" reader of chest x-rays but was previously a "B" reader. (EX 2, p. 7). Dr. Galgon's "B" reader certification expired at the end of December 2003 because he canceled his scheduled "B" reader examination due to illness. (EX 2, p. 7, 8).

Dr. Galgon is retired. (EX 2, p. 8). He works a few hours a week seeing mostly patients with sleep disorders and sees almost no lung patients. (EX 2, p. 8). Prior to retiring, Dr. Galgon was a pulmonary specialist who saw and treated patients with a wide variety of lung disorders such as emphysema, lung cancer, asthma, and coal workers' pneumoconiosis. (EX 2, p. 8). He does not have any Board certifications in the field of radiology but reviewed chest x-rays in his practice. (EX 2, p. 9).

Dr. Galgon summarized his report dated March 10, 2004. (EX 2, p. 9-21). He further opined that Claimant's 25-year smoking history at the rate of 1 pack per day was significant from a pulmonary standpoint. (EX 2, p. 11). Dr. Galgon noted the risk factors associated with this type of smoking history from a pulmonary standpoint included chronic bronchitis, emphysema, asthma, coal workers' pneumoconiosis, and lung cancer. Dr. Galgon opined that Claimant was significant overweight with a height of 71.5 inches and 269 pounds. (EX 2, p. 12-13).

On physical examination, he found trace bilateral pre-tibial pitting edema. (EX 2, p. 13). Dr. Galgon explained that this means there was fluid in Claimant's leg. (EX 2, p. 13). He stated that this was a very important finding because in an overweight patient the most common cause was related to weight and the fact that his legs were frequently in a dependent position. (EX 2, p. 13-14). However, Dr. Galgon noted that it can be an indication that the patient has right ventricular failure if he has a lung condition or has left and right ventricular failure if he has a heart condition. (EX 2, p. 14). In reviewing the chest x-ray, Dr. Galgon found that it was

negative for pneumoconiosis, Category 0/0, but showed that the left hemi-diaphragm was elevated. (EX 2, p. 14).

The pulmonary function test was not valid because the results of all his efforts and all the tracings were not included with the test results. (EX 2, p. 15-16). However, Dr. Galgon found the results helpful. (EX 2, p. 16). He found that it would be an adequate pulmonary function test for the evaluation of Claimant's symptoms if it were not a Black Lung situation. (EX 2, p. 16). He then compared his study to a pulmonary function test performed by Dr. Kraynak on May 21, 2003. (EX 2, p. 16). Dr. Galgon opined that Claimant performed significantly better on his study than on Dr. Kraynak's study which would be inconsistent with the progressive nature of coal workers' pneumoconiosis. (EX 2, p. 17).

Dr. Galgon discussed the results of the arterial blood gas study. (EX 2, p. 17-18). He opined that the measurements of pO_2 at rest and with exercise is one of the most important tests that can be done in evaluating a patient for coal workers' pneumoconiosis. (EX 2, p. 18).

> In the patient that has significant interstitial lung disease of any kind, including coal workers' pneumoconiosis, the expected result is that there would be at least a 10 millimeter drop in the pO_2. When one does not see the drop, and in fact, when one sees the rise, that's strong evidence that the patient does not have interstitial disease of any kind and is strong evidence that he does not have coal workers' pneumoconiosis.

(EX 2, p. 18).

Dr. Galgon concluded that Claimant does not have coal workers' pneumoconiosis or any other occupationally acquired lung disease. (EX 2, p. 19). He based his opinions on the examination which showed good breath sounds without rales or wheezes and the chest x-ray that showed no evidence of pneumoconiosis. (EX 2, p. 19). Dr. Galgon found it highly unlikely that the abnormal results on pulmonary function test were caused by coal workers' pneumoconiosis where there was no evidence of parenchymal disease on the chest x-ray. (EX 2, p. 19). Rather, he felt that the abnormal results were caused by Claimant's obesity, his protuberant abdomen pushing up on his diaphragm, and possible paralysis of his left diaphragm. (EX 2, p. 19-20).

On cross-examination, Dr. Galgon opined that Claimant does not have a disabling pulmonary condition despite shortness of breath and his use of breathing medication. (EX 2, p. 21). Dr. Galgon claimed that coal workers' pneumoconiosis did not cause the obstruction on Claimant's pulmonary function test. (EX 2, p. 22). He believed that Claimant's chest x-ray should have been at least a Category 2 or Category 3 before seeing an obstruction. (EX 2, p. 22). He opined that coal workers' pneumoconiosis could have been a cause of the reduction in pO_2 in Claimant's resting arterial blood gas study. (EX 2, p. 23). However, he found that to be highly unlikely in light of Claimant's obesity and the rise in pO_2 on exercise. (EX 2, p. 23). Dr. Galgon could not explain why Dr. Duncan, who also reviewed the chest x-ray, did not find an elevated diaphragm. (EX 2, p. 24). Although Dr. Galgon stated that edema in the extremities was consistent with coal workers' pneumoconiosis, he opined that the miner needed a Category 2 or

Category 3 on the chest x-ray and a significant drop in the pO_2 during the exercise portion of the arterial blood gas study. (EX 2, p. 25). He admitted that the requisite number of tracings was missing, and, therefore, that the pulmonary function test did not conform to the quality standards. (EX 2, p. 26).

Dr. Matthew J. Kraynak (CX 1)

Dr. Kraynak, who is Board-certified in family medicine, submitted a letter dated February 6, 2004. He was treating Claimant for "severe Black Lung Disease." Dr. Kraynak noted that Claimant complained of severe shortness of breath, productive cough, and exertional dyspnea. He recorded Claimant's coal mine employment history and smoking history. Claimant was employed in the anthracite coal industry for 25 years and has a 31 ½ pack year history of cigarette smoking. Dr. Kraynak reported that Claimant was still smoking ¾ pack of cigarettes per day. On physical examination, Claimant was short of breath, had wheezes in the lungs, and had cyanotic lips. Dr. Kraynak opined that Claimant's smoking history could have given rise to some obstructive pulmonary disease but would not have given rise to the "severe restrictive defect noted on pulmonary function." Dr. Kraynak concluded that Claimant's restrictive lung disease is due to exposure to coal dust and not prior tobacco use. Dr. Kraynak further opined that Claimant is totally and permanently disabled, secondary to his coal workers' pneumoconiosis, contracted during his employment in the anthracite coal industry.

Dr. Raymond J. Kraynak (CX 20)

Dr. Kraynak submitted a letter dated December 15, 2003. He stated that Claimant has been under his care for severe Black Lung Disease. He reported that Claimant suffers from severe shortness of breath, productive cough, and exertional dyspnea. Claimant gets short of breath with minimal exertion. Dr. Kraynak reported that Claimant worked for 25 years in the anthracite coal industry and had a 31 ½ pack year history of cigarette smoking. He noted that Claimant continued to smoke ¾ pack of cigarettes a day. Dr. Kraynak found cyanosis of the lips and an increase in the AP diameter with scattered wheezes during Claimant's physical examination. Although Dr. Kraynak opined that Claimant's smoking could have given rise to some element of obstructive pulmonary disease, he found that it would not have given rise to the severe obstructive and restrictive defects noted on pulmonary function. Dr. Kraynak concluded that Claimant is totally and permanently disabled due to coal workers' pneumoconiosis contracted during his coal mine employment.

Deposition of Dr. Raymond J. Kraynak (CX 21)

Dr. Kraynak was deposed on September 17, 2004. Dr. Kraynak reviewed the following documents in preparation for his testimony: his own deposition testimony of February 8, 2002; the hearing transcript of March 12, 2002; the Decision and Order Denying Benefits issued August 30, 2002; a medical report by Dr. Matthew Kraynak dated February 6, 2004, stating that Claimant was totally disabled due to black lung disease; a chest x-ray dated December 12, 2003, that was interpreted as positive for pneumoconiosis by Drs. Cappiello, Miller, and Ahmed; Dr. Galgon's medical report dated March 10, 2004, where he opined that Claimant did not have coal workers' pneumoconiosis; a chest x-ray dated March 10, 2004, that interpreted as negative for

pneumoconiosis by Drs. Galgon and Duncan and as positive by Drs. Ahmed and Miller. (CX 21, p. 6-10).

Dr. Kraynak testified that Claimant is his patient. (CX 21, p. 5). He has treated Claimant approximately every two months since his prior testimony on February 8, 2002. (CX 21, p. 5). Dr. Kraynak last examined Claimant on August 18, 2004. (CX 21, p. 5). Claimant's complaints included shortness of breath, productive cough, and difficulty walking at one-half block or up several steps without stopping to regain his breath. (CX 21, p. 5). Dr. Kraynak's physical examinations revealed that Claimant has cyanotic lips, which is indicative of lowered blood oxygen level, and scatter wheezes in the lungs. (CX 21, p. 6).

Dr. Kraynak personally performed a pulmonary function test on May 21, 2003. [16] (CX 21, p. 6). Claimant's FEV_1 was 45.72%, FVC was 59.75%, and MVV was 37.32% of the predicted values. (CX 21, p. 6). Claimant's cooperation and comprehension throughout the test were good. (CX 21, p. 7). He opined that this test would conform to Appendix B, Part 718 of the regulations. (CX 21, p. 7).

Dr. Kraynak opined that Claimant suffers from coal workers' pneumoconiosis contracted during his employment in the anthracite coal industry. (CX 21, p. 10). He determined that the etiology of Claimant's pneumoconiosis was his exposure to coal dust for over 25 years. (CX 21, p. 12). He further concluded that Claimant is totally and permanently disabled due to coal workers' pneumoconiosis. (CX 21, p. 10). He found that Claimant's condition has worsened over the course of his treatment. (CX 21, p. 11).

When asked if the record were to contain equal numbers of positive and negative chest x-ray interpretations, Dr. Kraynak opined that it would be more probable that coal workers' pneumoconiosis would be present given Claimant's exposure to coal dust. (CX 21, p. 11). He would give the interpretations by "B" readers slightly more weight. (CX 21, p. 12). Dr. Kraynak further found that the opacities noted on the December 12, 2003, film could not have been caused by smoking. (CX 21, p. 12).

Dr. Kraynak then considered the cause of Claimant's totally disabling respiratory impairment. (CX 21, p. 13). He considered Claimant's 31 ½ pack year smoking history and the fact that he continued to smoke up to ¾ of a pack of cigarettes per day. (CX 21, p. 13). He found that smoking cigarettes could give rise to some element of obstructive pulmonary impairment, but in his opinion, the extent of that impairment would "not be that great." (CX 21, p. 13). He noted that the chest x-rays show very little emphysematous changes that would be associated with an extensive smoking history. (CX 21, p. 13). Dr. Kraynak considered the pulmonary function test performed by Dr. Galgon with pre-bronchodilator and post-bronchodilator results. (CX 21, p. 13). He found that there was no reversibility with the bronchodilator, which he would have expected if Claimant's airway disease was due to tobacco use. (CX 21, p. 14). He opined that the causative factor for the obstruction noted would be coal workers' pneumoconiosis, which can give rise to a restrictive impairment that has an obstructive component. (CX 21, p. 14). Dr. Kraynak finds no correlation between the degree of obstructive disease and the radiographic findings due to coal workers' pneumoconiosis. (CX 21, p. 14).

[16] The results of this pulmonary function test are not otherwise included in the record.

Dr. Kraynak noted Claimant's weight around 280 pounds and classified him as overweight. (CX 21, p. 16). He said that Claimant's weight varies between 270 and 280 pounds. (CX 21, p. 16). Dr. Kraynak stated that the weight would slow Claimant down but had no significant impact on pulmonary function testing. (CX 21, p. 16).

On cross examination, Dr. Kraynak opined that Claimant is totally and permanently disabled due to coal workers' pneumoconiosis. (CX 21, p. 17). The basis for his opinion is the positive chest x-ray and Claimant's history of exposure to coal dust. (CX 21, p. 17). Dr. Kraynak admitted that all the films he referenced were interpreted as positive, Category 1/0, which is the most minimal classification for a positive reading. (CX 21, p. 18). He testified that people who are overweight and deconditioned could have shortness of breath on exertion without any lung disease. (CX 21, p. 22). He further testified that Claimant's 31 ½ pack year smoking history could give rise to some element of obstructive lung disease that could range from mild to severe depending on the individual. (CX 21, p. 22). Dr. Kraynak stated that sometimes a smoking induced obstructive lung disease will not result in reversibility (with bronchodilators on pulmonary function test) but usually only in patients that have severe emphysema. (CX 21, p. 23). If a person had an FEV_1 of 45.72% and no coal workers' pneumoconiosis, Dr. Kraynak would classify that as a severe impairment. (CX 21, p. 23). He would still expect to see some element of reversibility. (CX 21, p. 24). Dr. Kraynak felt that 31 pack years was a lot but "not outrageously a lot." (CX 21, p. 24).

Treatment Notes of Dr. Kraynak[17] (CX 27)

Claimant visited Dr. Kraynak on September 25, 2002; November 19, 2002; January 14, 2003; May 21, 2003; September 24, 2003; October 4, 2003; December 12, 2003; December 27, 2003; January 24, 2004; March 31, 2004; April 1, 2004; and August 10, 2004. Claimant's weight, when noted, ranged from a low of 276 to a high of 291 pounds. His visits were mostly to follow-up with his breathing. When noted, Dr. Kraynak recorded that Claimant experienced shortness of breath, decreased breath sounds, and mild wheezes, but he found no clubbing, edema, or cyanosis. Most of the notes are extremely brief and illegible.

Dr. Raymond J. Kraynak (CX 31)

Dr. Kraynak submitted a medical report dated May 27, 2005. It states as follows:

> I have reviewed a report generated by Dr. Fino, dated April 18, 2005. At no time did Dr. Fino examine Mr. Rothermel. Dr. Fino opined that the majority of chest x-ray readings are negative for pneumoconiosis. I would disagree with that. He felt that the pulmonary function study revealed only a slight reduction in the forced vital capacity, and that obesity was the explanation for this. Mr. Rothermel has been heavy all his life and did not have problems with his breathing up until the last few years. His reduction in the FEV1 and FVC are due to his Black Lung Disease and not to obesity. He also states there was no impairment with oxygen transfer. Hypoxemia with exercise is found only in a small percentage of miners.

[17] It is not clear from the record if these notes are from Dr. Matthew Kraynak or Dr. Raymond Kraynak.

I disagree with Dr. Fino. There is no doubt in my mind that Mr. Rothermel is totally and permanently disabled, due to Coal Workers' Pneumoconiosis, contracted during his employment with the anthracite coal industry.

Dr. Gregory J. Fino (EX 5)

Dr. Fino submitted a medical report dated April 18, 2005. He reviewed the following medical evidence: chest x-ray dated January 31, 2001; narrative report by Dr. Galgon dated January 30, 2002; Dr. Kraynak's office records dated January 29, 2002, to August 10, 2004; results of a pulmonary function test dated January 29, 2002; Dr. Galgon's medical record review dated January 30, 2002; Dr. Kraynak's January 31, 2002, medical report; Dr. Kraynak's deposition dated February 8, 2002; results of a pulmonary function test dated May 21, 2003; letter of medical opinion by Dr. Galgon dated November 4, 2003; chest x-ray dated December 12, 2003; Dr. Galgon's medical report dated March 10, 2004; Dr. Kraynak's deposition dated September 17, 2004; Dr. Galgon's deposition dated October 14, 2004; and a copy of the request for interrogatories by the Department of Labor.

Dr. Fino opined that Claimant does not have coal workers' pneumoconiosis. He based his opinion on (1) the majority of the chest x-ray being negative for pneumoconiosis, (2) the reduction in Claimant's FEV1 and FVC values were due to obesity, and (3) there was no impairment in oxygen transfer as Claimant did not become hypoxemic with exercise. From a functional standpoint, Claimant's pulmonary system is normal. Dr. Fino opined that Claimant's reduction in lung function is due to obesity. Assuming that Claimant's last job required sustained, heavy labor, Dr. Fino concluded that Claimant retains the physiologic capacity from a respiratory standpoint to perform all the requirements of his last job. Even if Dr. Fino assumed that Claimant had coal workers' pneumoconiosis, he opined that Claimant still would have no respiratory impairment and that he would be neither partially nor totally disabled from returning to his last mining job or a job requiring similar effort.

DISCUSSION AND APPLICABLE LAW

Length of Coal Mine Employment

The parties stipulated to 25.75 years of coal mine employment at the first hearing. (DX 53). Therefore, I find that Claimant has 25.75 years of coal mine employment.

Responsible Operator

The District Director designated Employer as the Responsible Operator. (DX 19, 20). Although Employer originally contested liability, it withdrew its objection at the original hearing before Administrative Law Judge Brown on March 12, 2002. (DX 53, p. 26). Judge Kaplan memorialized that Employer accepted the designation of Responsible Operator. (DX 55). On modification, the Regional Solicitor stated that Employer was no longer contesting its designation as Responsible Operator. (DX 86). I, therefore, find that Employer is the properly designated Responsible Operator in this matter.

Most Recent Period of Cumulative Employment with Responsible Operator

The Social Security Administration Itemized Statement of Earnings for Claimant reflects that he worked for Employer in 1997, 1998, and 1999. (DX 6). Moreover, Employer withdrew this issue on March 12, 2002, at the formal hearing before Judge Brown. (DX 53, p. 26). Therefore, I find that Claimant's most recent period of cumulative employment was with Employer.

Duplicate Claim

The provisions of 20 C.F.R. § 727.309 apply to claims that are filed more than one year after a prior denial. Duplicate claims offer a claimant whose condition has worsened as a result of coal workers' pneumoconiosis, relief from the ordinary principles of *res judicata*. *Lukman v. Director, OWCP*, 896 F.2d 1248 (10th Cir. 1990). Judge Kaplan denied Claimant's claim on September 5, 2002. Although Claimant appealed to the Board, he later requested that the case be remanded for modification proceedings. Claimant made this request on February 20, 2003, within one year of the prior denial. Therefore, I find that this is not a duplicate claim pursuant to 20 C.F.R. § 725.309(c), (d).

Modification

Section 725.310 provides that a claimant may file a petition for modification within one year of the last denial of benefits. Modification petitions may be based upon a change in condition or a mistake in a determination of fact. 20 C.F.R. § 725.310(a). On February 20, 2003, Claimant requested modification of Judge Kaplan's Decision and Order Denying Benefits dated September 5, 2002. I find that this modification proceeding is timely because Claimant requested modification within one year of the prior denial.

In deciding whether claimant has established a change in condition, I must "perform an independent assessment of the newly submitted evidence, in conjunction with evidence previously submitted, to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement . . .." *Napier v. Director, OWCP*, 17 BLR 1-111, 1-113 (1993). *See also Nataloni v. Director, OWCP*, 17 BLR 1-82, 1-84 (1993).

In deciding whether the prior decision contains a mistake in a determination of fact, I must review all the evidence of record, including evidence submitted since the most recent denial. New evidence, however, is not a prerequisite to modification based upon a mistake of fact. *Nataloni*, 17 BLR at 1-84; *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156, 1-158(1990), *aff'd on recon.* 16 BLR 1-71, 1-73 (1992). *See also O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254, 257 (1971). Rather, the factfinder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

In the prior denial, Judge Kaplan determined that Claimant was totally disabled. However, he found that Claimant did not have pneumoconiosis, that his pneumoconiosis did not arise out of his coal mine employment, or that his totally disabling respiratory disease was caused by pneumoconiosis. Based upon my review of the record as it existed at the time of this decision, I find no mistake of fact, even of the ultimate fact. The evidence submitted since this decision includes chest x-rays, pulmonary function tests, arterial blood gas studies, and narrative medical reports. Therefore, I will consider whether this evidence, in conjunction with the previously submitted evidence, establishes entitlement to benefits.

In an Order dated February 15, 2005, Judge Kaplan found that the amount of evidence submitted on modification is not limited by § 725.310 by virtue of § 725.2(c). (ALJX 6). However, I will not consider evidence that was in existence but not made available at the time of Judge Kaplan's Decision and Order. The Board has held that § 725.456(d) and *Wilkes v. F&R Coal Co.*, 12 B.L.R. 1-1 (1988) "mandates the exclusion of withheld evidence in the absence of extraordinary circumstances." Neither party mentioned any extraordinary circumstances; therefore, I shall exclude Claimant's Exhibits 23, 24, 25, 26, and 28 because all of these documents were in existence and seemingly available for submission at the time Judge Kaplan made his prior decision. I will consider all other newly submitted evidence on modification without regard to the evidentiary limitations required by the new regulations.

Applicable Law

Claimant's claim was made after March 31, 1980, the effective date of Part 718, and must therefore be adjudicated under those regulations. To establish entitlement to benefits under Part 718, Claimant must establish, by a preponderance of the evidence, the following elements:

1. That he suffers from pneumoconiosis;

2. That the pneumoconiosis arose, at least in part, out of coal mine employment;

3. That the claimant is totally disabled; and

4. That the total disability is caused by pneumoconiosis.

See §§ 719.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore*, 9 B.L.R. 1-4, 1-5 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211, 1-212 (1985). Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 B.L.R. 1-26, 1-27 (1987).

Judge Kaplan previously determined that Claimant is totally disabled. Therefore, I will review the remaining elements to determine if he is entitled to benefits under the Act.

Pneumoconiosis

In establishing entitlement to benefits, Claimant must initially prove the existence of pneumoconiosis under § 718.202. Claimant has the burden of proving the existence of

pneumoconiosis, as well as every element of entitlement, by a preponderance of the evidence. *See Director, OWCP, v. Greenwhich Collieries*, 512 U.S. 267 (1994). Pneumoconiosis is defined by the regulations:

> For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical" pneumoconiosis and statutory, or "legal" pneumoconiosis.
>
> (1) *Clinical Pneumoconiosis*. "Clinical pneumoconiosis" consists of those disease recognized by the medical community as pneumoconiosis, i.e., conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but it not limited to, coal workers' pneumoconiosis, anthraxcosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis, or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis*. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

§ 718.201(a).

Section 718.202(a) sets forth four methods for determining the existence of pneumoconiosis. The Third Circuit, however, requires that all relevant evidence must be weighed together to determine if Claimant suffers from pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22 (3rd Cir. 1997). Under § 718.202(a)(1), a finding that pneumoconiosis exists may be based upon x-ray evidence. Under § 718.202(a)(2), a determination that pneumoconiosis is present may be based, in the case of a living miner, upon biopsy evidence. Under § 718.202(a)(3), pneumoconiosis may be established if any one of the several cited presumptions are found to be applicable. Under § 718.202(a)(4), the existence of pneumoconiosis may be established through a physician's reasoned medical opinion.

There are ten newly submitted chest x-ray interpretations of two films dated December 12, 2003, and March 10, 2004, for consideration.

There are four interpretations of the December 12, 2003, film. Drs. Ahmed, Miller, and Capiello all determined that this film was positive for pneumoconiosis, Category 1/0, while Dr. Duncan found that this film was completely negative for pneumoconiosis. All four of these doctors have the same qualifications—all are Board-certified radiologists and "B" readers. There

are six interpretations of the March 10, 2004, film. Drs. Miller, Ahmed, and Capiello, who are all Board-certified radiologists and "B" readers, all found this film positive for pneumoconiosis, Category 1/0. However, Drs. Galgon, Duncan, and Fino all found this film completely negative for pneumoconiosis. Of these doctors, Dr. Duncan is the only one who has superior qualifications.[18]

I find that the chest x-ray evidence is sufficient to establish the existence of pneumoconiosis. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). I may also assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989). The majority of the doctors with superior radiological qualifications determined that the two most recent chest x-rays were positive for pneumoconiosis.

There is no biopsy evidence in the record. In this case, the presumption of § 718.304 does not apply because there is no evidence in the record of complicated pneumoconiosis. Section 718.305 is not applicable to claims filed after January 1, 1982. Finally, the presumption of § 718.306 is applicable only in a survivor's claim filed prior to June 30, 1982.

Any finding of pneumoconiosis under § 718.202(a)(4) must be based upon objective medical evidence and also be supported by a reasoned medical opinion. A reasoned medical opinion is one which contains underlying documentation adequate to support the physician's conclusions. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts, and other data on which he bases his diagnosis. *Oggero v. Director, OWCP*, 7 B.L.R. 1-860 (1985). A report may be adequately documented if it is based on items such as a physical examination, symptoms, and a patient's history. *See Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*,7 B.L.R. 1-295 (1984); *Buffalo v. Director, OWCP*, 6 B.L.R. 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 B.L.R. 1-130 (1979).

In the newly submitted evidence, there are five medical reports by Drs. Galgon, M. Kraynak, R. Kraynak (two reports), and Fino. Drs. Galgon and Fino both opined that Claimant does not have coal workers' pneumoconiosis. I give their opinions greater weight. Drs. Galgon and Fino are both specialists in internal medicine and pulmonary medicine. Both doctors offered well-reasoned opinions that were supported by underlying documentation.

Drs. M. Kraynak and R. Kraynak both opined that Claimant suffers from coal workers' pneumoconiosis. Although Drs. M. Kraynak and R. Kraynak were Claimant's treating physicians, I give their opinions less weight because they are neither well-reasoned or well-documented. Both doctors considered adequate coal mine employment and smoking histories. Dr. M. Kraynak merely opined that Claimant was totally and permanently disabled secondary to

[18] Note: Dr. Galgon is an "A" reader and Dr. Fino is a "B" reader; however, this information is not within the four corners of the record. See footnotes 4 and 7.

his coal workers' pneumoconiosis. He failed to provide any underlying documentation or reasoning for his diagnosis of coal workers' pneumoconiosis. Dr. R. Kraynak opined that Claimant suffered from coal workers' pneumoconiosis. He based his opinion on Claimant's exposure to coal dust for over 25 years. Only on cross-examination did Dr. R. Kraynak add that his opinion was also based on a positive chest x-ray. Both doctors noted that Claimant's lips were cyanotic, but, when they bothered to record such information during physical examinations, they noted that there was no cyanosis. Moreover, both doctors relied heavily on the results of pulmonary function testing to further support their claims that Claimant suffers from pneumoconiosis. Pneumoconiosis, however, cannot be established with the results of pulmonary function testing.

In conclusion, I find that the newly submitted chest x-ray evidence is sufficient to establish the existence of pneumoconiosis but that the newly submitted medical opinion evidence does not. Weighing all of this evidence together, and considering the evidence that was previously submitted, I find that Claimant has proven by a preponderance of the evidence that he suffers from pneumoconiosis.

Arising out of Coal Mine Employment

In order to be eligible for benefits under the Act, Claimant must prove that pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a). If a miner who is suffering from pneumoconiosis was employed for ten years or more in one or more coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment. 20 C.F.R. § 718.203(b) (2001). I have found that Claimant has clinical pneumoconiosis. The parties stipulated that Claimant has 25.75 years of work in or around one or more coal mines. Therefore, I find that Claimant's pneumoconiosis arose from his coal mine employment.

Total Disability

Claimant must demonstrate that he is totally disabled from performing his usual coal mine work or comparable work due to pneumoconiosis under one of the five standards of § 718.204(b) or the irrebuttable presumption referred to in § 718.204(b). Claimant previously proved by a preponderance of the evidence that he is totally disabled.

Total Disability Due to Pneumoconiosis

The amended regulations at § 718.204(c) contain the standard for determining whether a claimant's total disability was caused by his pneumoconiosis. Section 718.204(c)(1) determines that a miner is totally disabled due to pneumoconiosis if pneumoconiosis, as defined in § 718.201, is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition or if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. §§ 718.204(c)(1)(i) and (ii). Section 718.204(c)(2) states that, except as provided in § 718.305 and § 718.204(b)(2)(iii), proof

that the miner suffered from a totally disabling respiratory or pulmonary impairment as defined by §§ 718.204(b)(2)(i), (ii), (iv), and (d) shall not, by itself, be sufficient to establish that the miner's impairment was due to pneumoconiosis.

Except as provided by § 718.204(d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. § 718.204(c)(2).

A review of the newly submitted medical evidence reveals that only two of the four doctors, Drs. M. Kraynak and R. Kraynak, found that the Claimant was totally disabled. Both physicians found that Claimant suffered from pneumoconiosis and determined that he was totally disabled due to pneumoconiosis. I previously attributed little weight to these opinions because they were neither well-reasoned or well-documented. I further find that Dr. R. Kraynak's opinion is entitled to less weight because he discredits the role of Claimant's smoking history and his significant obesity. Dr. R. Kraynak testified that Claimant's weight was 280 pounds or varied between 270 and 280 pounds. The treatment notes show that Claimant weighed as much as 291 pounds at one time. Dr. R. Kraynak downplays the significance of Claimant's weight by finding that he had always been heavy and that the extra weight merely slows Claimant down but had "no significant impact on pulmonary function testing." At the time of Dr. R. Kraynak's deposition, Claimant was 66 years old with a 31 ½ pack year smoking history. Although Claimant had smoked for nearly half his life and continued to do so at the rate of up to ¾ pack of cigarettes per day, Dr. R. Kraynak felt that Claimant's smoking history was "a lot but not outrageously a lot."

Neither Dr. Galgon nor Dr. Fino found that Claimant was totally disabled. I, therefore, cannot consider their medical opinions for purposes of determining causation of total disability. Because of the lack of credible evidence regarding causation, I must find that Claimant has failed to prove by a preponderance of the evidence that his total disability is due to pneumoconiosis.

Entitlement:

Claimant, Allen A. Rothermel, has failed to establish a change in condition or a mistake in determination in fact. He has failed to prove that his total disability was caused by pneumoconiosis. This is an essential element of entitlement under the Act. Therefore, Mr. Rothermel is not entitled to benefits under the Act.

Attorney's Fees

An award of attorney's fees is permitted only in cases in which Claimant is found to be entitled to benefits under the Act. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for the representation and services rendered in pursuit of the claim.

ORDER

IT IS ORDERED that the claim of Allen A. Rothermel for benefits under the Act is hereby DENIED.

A

PAUL H. TEITLER
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS

If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).